SUPREME COURT OF THE UNITED STATES.

No. 85.

WM. F. CARY AND SAMUEL T. CAREY, PLAINTIFFS,

vs.

EDWARD CURTIS, (U. S.)

ON A CERTIFICATE OF DIVISION OF OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT U. S. FOR THE SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA, } ss.
Southern District of New York. }

I, James W. Metcalf, clerk of the circuit court of the United States of America for the southern district of New York, second circuit, do hereby certify, that the writings annexed to this certificate are true copies of their respective originals, on file and remaining of record in my office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, second circuit, this seventeenth day of December, in the year of our Lord one thousand eight hundred and forty-two, and of the independence of the United States the sixty-seventh.

[L. S.]

J. W. METCALF, *Clerk.*

UNITED STATES OF AMERICA, } ss.
Southern District of New York. }

At a circuit court of the United States, held at New York, for the southern district of New York, in the second circuit, on the 17th day of December, 1842: Present the Hon. Smith Thompson and Samuel R. Betts:

WILLIAM F. CARY, and SAMUEL T. CAREY,
vs.
EDWARD CURTIS.

This is an action of assumpsit to recover money paid to the defendant, as collector of the port of New York, for duties.

The declaration contained the common money counts.

The defendant plead the general issue.

J. & G. S. GIDEON, Printers.

The cause was tried at the November term of the circuit court last past.

The jury found for the plaintiffs, subject to the opinion of the court, among other things,

1st. That the plaintiffs paid the sum of $181 75 to the defendants, on the 3d July, 1841, for duties on the goods imported as being raw silk.

2d. That the goods on which the duties were demanded, and paid, were not raw silk, but a manufactured article.

3d. That the money so paid was paid under a written protest, made at the time of payment.

4th. That the money had been paid into the treasury by the defendant in the month of July, 1841, and before the commencement of this suit.

Upon the argument of this cause, after verdict, several questions arose; among others the following, viz:

Whether or not the second section of the act of Congress, approved on the 3d day of March, 1839, entitled "An act making appropriations for the civil and diplomatic expenses of government for the year 1839," was a bar to the action?

On this question, the opinions of the judges were opposed. Whereupon, on motion of the plaintiffs, by their counsel, it was ordered, that the foregoing state of the pleadings and facts, which is made under the direction of the judges, be certified under the seal of this court, according to the statute in such case made and provided, to the Supreme Court of the United States, to the end that the question on which the said disagreement has happened may be finally decided.

SMITH THOMPSON,
SAMUEL R. BETTS.

Filed 4th January, 1843.

SUPREME COURT OF THE UNITED STATES.

No. 86.

LESSEE OF ANGELICA CROGHAN & AL., PLAINTIFF,

vs.

JOHN NELSON.

ON A CERTIFICATE OF DIVISION FROM THE CIRCUIT COURT U. S. FOR KENTUCKY.

UNITED STATES OF AMERICA,
Eighth Circuit, and Kentucky District. } *sct.*

JOHN DOE, on the demise of Angelica Croghan and others,
against
JOHN NELSON, &c. } In ejectment.

Be it remembered that heretofore, to wit, at the May term of the eighth circuit court of the United States, in and for the district of Kentucky, on the seventh day of May, A. D. eighteen hundred and forty-two, the following adjourned questions in the above cause *was* ordered to be entered, to wit:

Be it remembered that, on the trial of this cause, the plaintiffs read to the jury the following patent, (see patent for 1,000 acres copied hereafter,) and introduced evidence proving that the lessors of the plaintiff were the children of Geo. Croghan, to whom the land was devised by Charles Croghan, and that it was devised to said Charles by the patentee. They also proved that the patent boundary covered the land in contest, and that the tenant of defts. was in possession at the date of the service of the declaration in ejectment.

The following plat, marked A, was shown to the jury; and the surveyor proved that the fork of Mayfield creek, at letter A, was correctly laid down; that 500 poles on a straight line on the branch or bayou leading from Mayfield creek, would extend the line to letter B on the plat, where one of the patent corners was found, and that the plat truly represented the land granted.

The defendants then read the following entry of William Croghan, assignee, for 1000 acres, dated 16th Aug., 1784, on which plaintiff's patent is founded, (see it copied hereafter,) and proved by the surveyor, that the beginning of the entry was at A on the plat, and that the end of the 2d call of the entry was at letter B, and that if a line was run from B, towards the Miss. river, in a direction parallel with the general course of Mayfield creek, for 12 miles above the forks at letter A, it would be the red line extending from the letter B to the Miss. river at F.

They also proved if a parallel line were run from the corner at B, with northern fork of Mayfield creek, below the fork, (that is, from A to D,) it would be from B to E, and leave out the land claimed by defendants, which land is marked on the plat Nelson and James Suttle, and is covered by a patent from the Commonwealth of Kentucky to Hugh Nelson, the ancestor of the defts.

The land included in the peninsula inside of the line from B to E, contains 887 acres. The patent to Nelson is as follows (see it inserted hereafter).

The surveyor also proved that the various lines on the plat were correctly laid down on the plat from actual survey. The counsel for the defendants then asked the court for the following instruction, (see instructions marked B, inserted hereafter,) but the court were divided in opinion on the point, whether the second line called for in the entry should run from B to E, or whether the line from B to C should be taken, and recognised as the true and proper line, it being the line on which the patent was founded. One judge being of opinion, that for all the land south and west of a line from B to E the patent was void, and the other judge being of a contrary opinion.

2. The court were also divided in opinion, (for the foregoing reasons,) whether the aforesaid instructions ought to be given or refused; whereupon, said points are certified to the Supreme Court of the United States, for its decision and instructions thereon.

N. B. It was proved that the bayou laid down on the plat from A to B, was a branch occasioned by the high water from the Mississippi, and that at high water it runs out of said creek, and empties into the river at the upper end of the iron banks; but in dry seasons, the water did not run through that bayou, and in the summer season it was dry. It was also proved that along this bayou was a very dense cane brake; and the greater part of the land is still a dense cane brake.

Patent for 1,000 *acres.*

Joseph Desha, esq., Governor of the Commonwealth of Kentucky, to all to whom these presents shall come, greeting: Know ye, that by virtue and in consideration of part of a Virginia land office military warrant, No. 2,023, there is granted by the said Commonwealth unto William Croghan, a certain tract or parcel of

land, containing one thousand acres, by survey bearing date the fifth day of November, one thousand eight hundred and twenty-five, lying and being in the district set apart for the officers and soldiers of the Virginia State line, southwest of the Tennessee river, and bounded as followeth, to wit: beginning at a fork of Mayfield creek, occasioned by high water from the Mississippi river, and which creek or bayou empties into the Mississippi at the upper end of the iron banks, on a walnut, sweet gum, and ash standing on the west bank of the creek; running thence down the bayou or branch aforesaid with the meanders thereof, S. 18° west 134 poles, S. 36° W. 200 poles, S. 48° W. 72 poles, S. 18° W. 14 poles, S. 18° W. 54 poles, S. 30° W. 120 poles; thence S. 110 poles, to two ash trees, a hackberry, and red bud on the west bank of the bayou; thence N. 75 W. 206 poles, to an elm, a sycamore, and box elder on the bank of the Mississippi river; thence up the same, with its meanders, and binding on it at low water mark, N. 26° E. 230 poles, N. 12° E. 320 poles; thence N. 245 poles; thence N. 8° west, 280 poles, to a walnut and two cotton wood trees at the mouth of Mayfield creek; thence up the creek, with the several meanders thereof, and binding on the same at low water mark, N. 37° E. 28 poles, S. 63° E. 20 poles, S. 18° E. 74 poles, S. 41 E. 34 poles, S. 53 E. 32 poles, S. 7° E. 16 poles, S. 8° W. 68 poles, S. 8° E. 20 poles, S. 15° E. 24 poles, S. 33 E. 40 poles, S. 37° E. 43 poles, S. 16° E. 15 poles, S. 14° W. 20 poles, S. 35° west 71 poles, S. 14 W. 37 poles, S. 39° E. 22 poles, S. 55° E. 20 poles, S. 32° east 24 poles, S. 20° E. 46 poles, S. 8° E. 30 poles; thence N. 78° east 7 poles, to the beginning; with the appurtenances, to have and to hold the said tract or parcel of land, with its appurtenances, to the said William Croghan and his heirs forever.

In witness whereof, the said Joseph Desha, esq., Governor of the Commonwealth of Kentucky, hath hereunto set his hand, and caused the seal of the said Commonwealth to be affixed, at Frankfort, on the 29th day of November, in the year of our Lord one thousand eight hundred and twenty-six, and of the Commonwealth the thirty-fifth.

[L. s.]

JOSEPH DESHA.

By the Governor:

J. C. PICKETT, *Secretary.*

A copy. Attest:

JNO. M. FOSTER, *R. L. O.*

By E. A. McCURDY, *D. R.*

[For map see original.]

Entry of 1,000 *acres by Wm. Croghan, assignee.*

August 16*th*, 1784.

Wm. Croghan, assignee, enters 1,000 acres of land, part of a military warrant, No. 2,023, beginning at a fork of Mayfield creek, about two miles by water above fort Jefferson, where a branch, occasioned by the high waters from the Mississippi, runs out of said creek, and at high water empties into the river at the upper end of the iron banks; from said beginning 500 poles, when reduced to a straight line; and then off from the branch towards [the] Mississippi on a line parallel to Mayfield creek, until a line from the extremity of said line, parallel with the first line, will strike Mayfield creek, to include the quantity.

A copy. Attest:

JNO. M. FOSTER, *R. L. O.*
By C. G. MORRIS, *D. R.*

Patent to Hugh Nelson.

Thomas Metcalfe, Governor of the Commonwealth of Kentucky, to all to whom these presents shall come, greeting: Know ye, that by virtue and in consideration of the sum of fifty-one dollars and fifty cents paid into the Receiver's office at Waidsboro', agreeably to an act of Assembly, approved the third day of January, one thousand eight hundred and twenty-five, there is granted by the said Commonwealth unto Hugh Nelson, the fractional N. west quarter of section 32, township five, range four west, containing one hundred and three acres, with its appurtenances; to have and to hold the said tract or parcel of land, with its appurtenances, to the said Hugh Nelson and his heirs forever.

In witness whereof, the said Thomas Metcalfe, esq., Governor of the Commonwealth of Kentucky, hath hereunto set his hand, and caused the seal of the said Com-
[L. S.] monwealth to be affixed, at Frankfort, on the 17th day of December, in the year of our Lord one thousand eight hundred and thirty, and of the Commonwealth the 39th.

THOMAS METCALFE.

By the Governor:
T. T. CRITTENDEN,
Secretary of State.

A copy. Attest:

JAMES ROBERTSON, *R. L. O.*
By RICHARD LONG, *D. R.*

Instructions, marked B, as asked by defendant's counsel, to wit:

The counsel for the defendants ask the court to instruct the jury, if they believe from the evidence that the course of Mayfield

creek, from A to D, is correctly laid down, then the line from B towards the Mississippi river should be run parallel to that to conform to the entry; and if, in running that parallel line, they shall believe from the evidence that the improvement of the defendants is left out, they ought to find for the defendants.

UNITED STATES OF AMERICA,
Eighth Circuit and District of Kentucky. } *sct.*

I, John H. Hanna, clerk of the circuit court of the United States of America, in and for the circuit and district aforesaid, do hereby certify that the preceding seven pages (this included) contain a true copy of the adjourned questions and exhibits referred to therein and made parts thereof, now on file in my office in the suit depending in said court, wherein John Doe, on the demise of A. Croghan and others, is plaintiff, and Jno. Nelson, &c., defendants.

In testimony whereof, I have hereto subscribed my name and affixed the impress of the seal of said court, this thirteenth day of October, A. D. eighteen hundred and forty-two, and of our independence the sixty-seventh.

[L. S.]

JNO. H. HANNA, *C. C. C. K. D.*

Filed 7th January, 1843.